Supreme Court, U.S.
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No. 03-643

In the

Supreme Court of the United States

SOLOMON LANGMAN,

Petitioner,

v.

EMANUEL LAUB, JAMES JOHNSON, MEL WEITZ, HAROLD FRIEDMAN, JON GREENFIELD, SAM PELTZ, MANUEL MONACO, HECTOR TORRES and SIDNEY BLUMGOLD, trustees of Local 338 Retirement Fund; RETAIL, WHOLESALE AND CHAIN STORE FOOD EMPLOYEES UNION RETIREMENT TRUST BOARD OF TRUSTEES, Administrator of Local 338 Retirement Fund; and LOCAL 338 RETIREMENT FUND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW RELATING TO SPDs CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS

Certiorari should be granted because there are irreconcilable splits between the Courts of Appeals concerning whether a showing of prejudice or detrimental reliance is required before a participant may enforce the terms of an SPD. Some circuits require a form of prejudice; some require detrimental reliance; at least one requires likely prejudice; and two require neither prejudice nor detrimental reliance. (*See* Pet., pp. 4-5, n. 2 and 3).

Supreme Court resolution of this issue is important because without one national standard similarly situated participants in the same plan are being treated differently; participants who happen to reside in e.g., the Third Circuit, will have their benefits determined under the terms of the SPD, and participants who happen to reside in e.g., the Second Circuit, will have their benefits determined under the terms of the plan. This disparity of treatment defeats ERISA's purpose of ensuring a uniform body of benefits law, is manifestly inequitable and increases the burdens on the courts and on plan administration.

Instead of contesting the important need for establishing one national standard on SPD claims, respondents oppose certiorari by arguing that a writ would "accomplish nothing." (Opp. Br., p. 2). Respondent's argument is entirely premised on the following case specific factual assertions which are demonstrably incorrect:

(1) There is no conflict between the terms of the SPD and the Plan (Opp. Br., p. 6);

(2) The provisions of the 1984 and 1994 SPDs are inapplicable to petitioner's benefit because his 1974-1979 separation of service predated the issuance of the SPDs (Opp. Br., p. 2);

(3) Petitioner would not benefit from the Court's relief because he has already received all the relief to which he is entitled (Opp. Br., p. 5);

(4) Even if the SPD had disclosed the effect of the 1984 and 1994 amendments (the "Freeze Provisions"), it would have made no difference in the calculation of petitioner's benefit (Opp. Br., p. 4); and

(5) Petitioner would not have been entitled to relief even under the standard applied by the Third Circuit because the omission of the Freeze Provisions from the SPD was immaterial (Opp. Br., p. 8).

Respondent's argument should be rejected. Far from achieving nothing, if this Court were to hold that the terms of an SPD may be enforced without the requirement of prejudice or detrimental reliance, petitioner would be entitled to significant relief. In accordance with the terms of the 1994 SPD (the SPD in effect when petitioner retired in 1996), petitioner would be entitled to a monthly retirement benefit of $1,633.30, instead of the $1,033.30 he is currently receiving. This is because the 1994 SPD promises a retirement benefit equal to $50 times the total number of years of service in covered employment. It does not matter when those years were earned and it does not matter whether a participant incurred any intervening separations of service. Thus, petitioner would be entitled to a retirement benefit equal to $50 x 32.666=$1,633.30.

None of the "Alice-in-Wonderland" assertions raised by respondents change this simple and straightforward

calculation. None detract from the need for this Court to establish a national standard.

Incorrect Assertion (1)—There is no conflict between the terms of the SPD and the Plan

Respondents argue that a writ would accomplish nothing because "petitioner failed to show a conflict in terms between the Plan and SPD at issue." (Opp. Br., p. 6). In making this assertion, respondents seek to distinguish an SPD that "omits" a description from one that contains a "conflicting term." (Opp. Br., p. 2). But, respondents' duty to furnish a complete and accurate SPD applies equally to omissions. The Department of Labor Regulations specifically provide that an SPD must "not have the effect of misleading, misinforming or failing to inform participants and beneficiaries." 29 C.F.R. §2520.102-2(b)(emphasis added).

In any event, this is not a case of an omission. The SPD and the plan document both describe the plan's benefit formula; they just do it differently. And there could be no bigger and more important "conflict" than when an SPD specifies a different benefit formula than the plan document. The SPD in the case at bar promises, without any qualification, a monthly retirement benefit equal to $50 multiplied by the number of years of service in covered employment ($50 x 32.666 years). By contrast, the Plan document provides petitioner and other similarly situated participants with a significantly lower pro-rated benefit ($20 x 20 years +$50 x 12.666 years).

Accordingly, the SPD failed to inform petitioner of the significant effect that the Freeze Provisions have on the Plan's benefit formula and the calculation of his benefit. As a result, the SPD was misleading and petitioner was misinformed.

Incorrect Assertion (2)—The 1984 and 1994 SPDs are inapplicable to petitioner's benefit because his 1974-1979 separation of service predated the SPDs

Respondents argue that a writ would accomplish nothing because "regardless of the standard applied, neither the terms of the 1994 SPD nor of the 1984 SPD could affect the calculation of Langman's benefit as of the date of his return to covered employment in 1979."[1] (Opp. Br., p. 3). But, whether or not the separation of service predated the issuance of the SPDs is immaterial. There can be no dispute that respondent calculated petitioner's benefit not by applying the terms of the 1979 plan, but by applying the terms of the terms of the 1994 plan--the plan in effect at the time of his retirement.[2] Because the terms of the 1994 plan document were unquestionably applicable to petitioner, *a fortiori*, the terms of the 1994 SPD also were applicable.

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[1] The hypocrisy of respondent's assertion is mind-boggling. When respondents calculated petitioner's benefit, they retroactively applied the terms of the 1994 Freeze Provisions to petitioner's 1974-1979 separation from service—indeed, when petitioner returned to service in 1979, the Plan had no Freeze Provisions. Their current statement that "[t]he SPDs between 1984 and 1996 simply have no effect on the years of his separation, namely, 1974-1979," (Opp. Br., p. 4) is contrary to repondents' own actions and is disingenuous.

[2] The Second Circuit's decision conclusively establishes that respondent's construed the provisions of the 1994 plan in calculating petitioner's benefit. (Pet. App., p. 3a).

Incorrect Assertion (3)—Petitioner would not benefit from the Court's relief because he has already received all the relief to which he is entitled

Respondents argue that a writ would accomplish nothing because petitioner would not benefit from the Court's relief; that he has already received all the relief to which he is entitled. (Opp. Br., p. 5). Petitioner does not dispute that he has already received the benefit to which he is entitled under the terms of the Plan document. What petitioner has not received is the benefit described and promised to him in the 1994 SPD. Clearly, as described *supra*, enforcement of the 1994 SPD would significantly increase the monthly benefit to which petitioner is entitled.

Incorrect Assertion (4)—Even if the SPD had disclosed the effect of the Freeze Provisions, it would have made no difference in the calculation of petitioner's benefit

Respondents argue that a writ would accomplish nothing because even if the SPD had disclosed the effect of the Freeze Provisions, it would have made no difference to the calculation of petitioner's benefit. (Opp. Br., p. 4). They cite the Second Circuit as stating, "plaintiff would have been in the same position even if the Trustees had included a description of the separation provision in the 1984 SPD." (Opp. Br., p. 4).

This argument fundamentally misconstrues the nature of SPD claims.[3] SPD claims are by their essence contract

[3] Obviously, if the SPD contained a description of the Freeze Provisions, petitioner would not have been misled and misinformed. Petitioner is entitled to enforce the terms of the SPD precisely because the SPD did not contain a description of the Freeze Provisions.

interpretation claims, not damage claims. When there is a conflict between the plan document and the SPD, there is a conflict between the two official contractual documents mandated by ERISA. To resolve this conflict, the courts as a rule of contract interpretation give controlling effect to the language of the SPD—the only document required to be distributed to participants. "Any other rule would be, as the Congress recognized, grossly unfair to employees and would undermine ERISA's requirement of an accurate and comprehensive summary." *Hansen v. Continental Insurance Company*, 940 F.2d 971, 982 (CA5 1991).

By incorrectly portraying an SPD claim as a claim requiring damages, respondents, and indeed the Second Circuit,[4] run contrary to established Supreme Court precedent. In *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985), the Supreme Court held that ERISA participants may not recover consequential damages.

Accordingly, it is wholly irrelevant whether or not petitioner was damaged by the defects of the SPD. The omission of a description of the Freeze Provisions violated ERISA §102, 29 U.S.C. §1022 and caused petitioner to reasonably believe that his monthly pension would be $1,633.30. Petitioner should be entitled to enforce the controlling language of the SPD whether or not he suffered unrecoverable consequential damages.

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[4] The Second Circuit held in the case at bar, "[a] plaintiff may bring an action against a plan administrator 'for any damages that result from the failure to disclose.'" (Pet. App., p. 20a).

Incorrect Assertion (5)—Petitioner would not have been entitled to relief even under the standard applied by the Third Circuit because the omission of the Freeze Provisions from the SPD was immaterial

Respondents argue that a writ would accomplish nothing because petitioner would not have been entitled to relief even under the liberal standard applied by the Third Circuit in *Burstein v. Retirement Account Plan for Employees of Allegheny Health Education and Research Foundation*, 334 F.3d 365, 380 (CA3 2003). They argue that the Third Circuit requires a "material conflict" between the Plan and SPD, and that the omission of the Freeze Provisions does not establish a material conflict. (Opp. Br., pp. 7-8).[5]

Respondent's assertion that the omission of the Freeze Provisions was immaterial is incorrect. There is nothing more fundamental and material than disclosure of the manner in which a benefit is calculated. An SPD must describe "the plan's requirements respecting eligibility for participation and benefits" and the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." ERISA §102(b), 29 U.S.C. §1022(b).

There is unquestionably a "material conflict" when the terms of the SPD provide for a monthly benefit of $1,633.30 and the terms of the Plan provide for a monthly benefit of $1,033.30, a 37% difference.

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[5] Respondents make no attempt argue to that there is no split between the Third's Circuit decision in *Burstein* and the Second Circuit's decision herein. Indeed, they recognize that even among the Circuits that require prejudice or detrimental reliance, there are differences. They state, "Petitioner could not prevail under any of the theories espoused by the various circuits." (emphasis added).

II. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW RELATING TO ERISA's MINIMAL ACCRUAL STANDARDS VIOLATED THIS COURT'S WELL-ESTABLISHED RULES OF STATUTORY CONSTRUCTION

Certiorari should be granted because the Second Circuit violated this Court's established rules of statutory construction by relying on inferences drawn from the legislative history even though the language of the statute provides a clear answer. *See Harris Trust and Savings Bank v Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000), *citing*, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

Respondents argue that "Langman's proffered interpretation of that statute squarely contradicts the statute's language and history, as well as the interpretation of the Second Circuit ...." (Opp. Br., p. 9). The fact is, however, the Second Circuit rendered no interpretation of the statutory language. As a consequence, it never held that petitioner's interpretation "contradicts the statute's language." Therefore, it cannot be true that petitioner's interpretation contradicts "the interpretation of the Second Circuit."

Respondents argue that ERISA §204(b)(1)(B)(i), 29 U.S.C. §1054(b)(1)(B)(i), "exempts across the board unit benefit rate increases from the comparative test, because the rate 'in effect for the current year' (e.g., $50 for respondent's benefit calculation in 1996) shall be treated 'as in effect for all other plan years.'" This is respondents' argument, not the Second Circuit's. Indeed, the Second Circuit provided no analysis of the language of ERISA §204(b)(1)(B), relying instead on the legislative history. The Second Circuit thereby ignored this Court's precedents requiring that any analysis begin with the statute.

In any event, the applicable ERISA provision is not §204(b)(1)B)(i), which deals with plan amendments, but §204(b)(1)(B)(ii), which deals with changes in accrual rates. That provision does not exempt a plan from compliance with the 133 1/3% rule unless the change in accrual rate "does not apply to any individual who is or could be a participant in the current year." Clearly, an across-the-board rate increases applies to individuals who are participants in the current year.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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